IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03/12/2003

CORAM

THE HONOURABLE MR.JUSTICE N.DHINAKAR
AND
THE HONOURABLE MR.JUSTICE A.KULASEKARAN

O.S.A.No.5 of 1998

NEPC Micon Limited,
36, Wallajah Road,
Madras 600 002. .. Appellant

-Vs-

M/s.Siemens Ltd., rep. by
its Power of Attorney
Holder, S.S.Godbole. .. Respondent

Prayer:- Appeal against the order of this Court dated 24.7.97 passed in Appln.No.3465 of 1995 in C.S.No.1019 of 1995.

!For Appellant : Mr.T.R.Rajagopal, S.C.
M/s.K.Bhanumathi

^For Respondent : Mr.S.Ramasubramani, S.C.
For M/s.K.V.Rajan

:J U D G M E N T

(Judgment of the Court was delivered by N.DHINAKAR, J.)

This is a classic text book example of how a debtor can evade payment of his dues by hiding in the lanes and bye-lanes of law.

2. The suit was filed by the respondent/plaintiff against the appellant/defendant in C.S.No.1019 of 1995 for recovery of Rs.96 lakhs and odd towards the supply of generators for wind mill. A petition was filed in Application No.1187 of 1996 to record the Memorandum of Compromise dated 29.11.95 entered into between the parties. In the said memorandum of compromise, it was stated that the appellant/ defendant will pay a sum of Rs.76,02,166.54 and on receipt of the said amount, the suit will be withdrawn. The learned single Judge, by his order dated 10.4.96, refused to record the memorandum of compromise by stating that the memorandum of compromise cannot be taken in parts and the earlier part made into enforceable decree even while

the later part remains part of the compromise memo signed by the parties. According to the learned single Judge, the memo of compromise shows that it is only a private arrangement by which the defendant was to make the payment and after such payment, the plaintiff has to withdraw the suit as having been settled out of Court and as the payment not having been made, the plaintiff is unwilling to withdraw the suit and therefore, there can be no decree in terms of the compromise and accordingly, he refused to record the said compromise. It is also stated that at the time when the suit was filed, a letter dated 16.9.94 sent by the appellant/defendant to the respondent/ plaintiff was also filed wherein the appellant/defendant has admitted that a sum of Rs.76 lakhs and odd is due and payable to the respondent/plaintiff. During the pendency of the suit, another application was filed in Application No.34 65 of 1995 by the plaintiff/respondent to pass a decree for the admitted amount taking the admission made in the abovesaid letter dated 16 .9.94 as well as the admission made in the compromise memo in terms of Order 12 Rule 6 C.P.C. The learned

single Judge allowed the petition and passed the impugned order. The defendant, aggrieved by the said order, is now before us challenging the said order.

3. The learned Senior Counsel appearing for the appellant/ defendant submits that the compromise memo having been rejected earlier by a learned single Judge, it ought not to have been taken into consideration when the order in Application No.3465 of 1995 was allowed and a decree was passed in terms of Order 12 Rule 6 C.P.C. on the basis of the admission made by him in the letter dated 16.9.94 and in the compromise memo dated 29.11.95. It is his submission that the order dated 10.4.96 passed in Application No.1187 of 1996 acts as a res judicata for the learned Judge to have passed a decree for the admitted amount. It is his further submission that he has a counter claim and in his written statement, he has stated that there are amounts due from the plaintiff and therefore, the learned single Judge ought to have taken into consideration the counter claim of the defendant/appellant under Order 20 Rule 19 C.P.C. and the learned single Judge not having given a set off for the counter claim, the impugned order is bad in law.

4. Per contra, the learned Senior Counsel appearing for the respondent/plaintiff submits that the memorandum of compromise was not recorded and it is not as if the learned single Judge dismissed the memorandum of compromise and therefore, it does not act as res judicata. It is his further submission that the letter dated 16.9.94, wherein the defendant has admitted that an amount of Rs.76 lakhs and odd is due and payable, as well as his admission made in the compromise memo clearly show that the said amount is due and payable by him and therefore, under Order 12 Rule 6 C.P.C. the learned single Judge was justified in passing a decree for the admitted amount. It is his further submission that if there is a counter claim, it is for the learned single Judge to decide whether the said counter claim can be treated as a separate suit or as a homogeneous one and the stage has not yet reached and he intends to move the learned single Judge to treat the counter claim as a separate suit in terms of Order 8 Rule 6-C of C.P.C.

5. Before we take up the contentions raised, we wish to

extract Order 12 Rule 6 C.P.C. It reads as follows:-

(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other questions between the parties, make such order or give such judgment as it may think fit, having regard to such admissions."

The question that is to be decided by us is whether there was an admission by the appellant/defendant that he has to pay an amount of Rs.7 6 lakhs and odd to the respondent/plaintiff. While the learned counsel appearing for the respondent/plaintiff relies upon the compromise memo filed before the learned single Judge in Application No.1187 of 1996, which was rejected on 10.4.96 and also the letter dated 16.9.94 written by the appellant/defendant, the learned counsel for the appellant/defendant submits that the compromise memo, having been rejected by the learned single Judge by his order dated 10.4.96, cannot be taken into consideration as an admission made by him. According to him, the order dated 10.4.96 passed in Application No.1187 of 1996 rejecting the compromise memo acts as a res judicata for the learned single Judge to pass a decree for the admitted amount by the impugned order dated 24th July, 1997.

6. We have carefully considered the contentions of both the learned Senior Counsel and also the law on the subject. We will now take up the first contention of the learned counsel for the appellant that the compromise memo dated 29.11.95 acts as a res judicata and the learned single Judge was not justified in passing the decree for the admitted amount in terms of Order 12 Rule 6 C.P.C.

7. A perusal of the order of the learned single Judge indicates that the memo of compromise was not rejected, but the learned single Judge did not record the said memo of compromise. In his order, he has stated that the memo of compromise contemplates the payment of the monies mentioned in the memorandum and after such payment, the plaintiff has to withdraw the suit as having been settled out of Court and the plaintiff could not withdraw the suit as the defendant/appellant did not pay the amount. He went on to add that the memo of compromise cannot be taken in parts and the earlier part made into enforceable decree even while the later part remains part of the compromise memo signed by the parties and according to him, the compromise memo is only a private arrangement by which the defendant was to make the payment and after such payment, the plaintiff has to withdraw the suit as having been settled out of Court and the payment not having been made, the plaintiff cannot be forced to withdraw the suit and there can be no decree in terms of the compromise memo. Accordingly, the learned single Judge refused to record the said compromise memo. The order of the learned single Judge shows that the respondent/plaintiff was unwilling to withdraw the suit as the payment was not made by the appellant/defendant and therefore, there can be no decree in terms of the memo filed in Court. This indicates that the learned single Judge did not reject the compromise memo but could not record the

compromise on account of the fact that the appellant/defendant did not keep up his promise by paying the admitted amount. In that view of the matter, we find it difficult to accept the first contention of the learned counsel for the appellant.

8. We will now take up the second contention that there cannot be an interim decree without the learned single Judge taking into consideration the counter claim of the appellant/defendant. Before we proceed to consider the said contention, we feel it better to extract Rule 6, Rule 6-A as well as Rule 6-C of Order 8, which are as follows:-

"6. (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiffs demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) The written statement shall have the same effect as a plaint in a Effect of set-off cross-suit so as to enable the Court to pronounce a final judgment in respect of both the original claim and of the set-off, but this shall not affect the lien, upon the amount decreed, to any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off."

Order 8 Rule 6-A is to the effect that
"a defendant in a suit may, in addition to his right of pleading a set-off under Rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not".

A proviso to the said Rule 6-A states that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the Court. Sub rule 2 to Rule 6-A states that such counter-claim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. Sub rule 3 states that the plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court and Sub rule 4 mandates that the counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. Under Order 8 Rule 6-C, it is contemplated that
"where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that

such counter claim may be excluded, and the Court may, on the hearing of such application, make such order as it thinks fit".

9. The learned single Judge, while passing the impugned order, has stated that after the compromise was entered into between the parties on 29.11.95, the appellant/defendant had written a letter to the plaintiff/respondent on 29.12.95, which reads as follows:-

"Pursuant mutual of the memorandum of compromise dt.29.11.95 entered into between yourself and ourselves, we have sent cheques bearing No.965504 dt.28.12.95 for Rs.75,68,807.50 (Rupees Seventy five lakhs sixty eight thousand eight hundred and seven and paise fifty only) and cheque No.965532 Dt.29.12.95 for Rs.33,359.00 (Rupees Thirty three thousand three hundred and fifty nine only) in full and final settlement of the amount claimed by you in the Suit No.1019 of 1995 filed in the High Court of Madras."

The learned single Judge further observed that the respondent/ plaintiff sent a letter dated 2.1.96 to the appellant/defendant by way of a reminder to ensure the total amount of Rs.76 lakhs and odd is honoured when the cheques are presented and in the same letter, he has also informed that he will be presenting the cheques on 4.1.96. The learned Judge also referred to the contents of the letter of the appellant/defendant sent on the same day to the plaintiff/respondent requesting him to deposit the cheques on 5.1.96 instead of 3.1.96. The learned single Judge further held that the cheques were presented on 5.1.96 as requested by the appellant/defendant, but they were dishonoured. It was not disputed before the learned single Judge that the appellant/defendant sent a letter dated 16.9.94 and also sent a letter dated 29.12.95 admitting the fact that he has to pay Rs.76 lakhs and odd to the plaintiff/respondent and therefore, the learned single Judge passed a decree for the admitted amount in terms of Order 12 Rule 6 C. P.C. An occasion had arisen for a learned single Judge of this Court to interpret Order 8 Rule 6-A vis-a-vis Order 8 Rule 6-C in T.K.V.S. VIDYAPOORNACHARY SONS vs. M.R.KRISHNAMACHARY (A.I.R. 1983 MADRAS 291) in the background of Order 8 Rule 6 C.P.C. The learned single Judge, while considering Order 8 Rule 6-A of C.P.C. has held that Order 8 Rule 6 of the Code, which is retained in its old form even after the Amendment Act 104 of 1976, speaks only of a set off being put forward by a defendant in a suit as a ground of defence and there are cases in the books which distinguish a set off on one hand and the counter claim on the other and even before Rule 6-A was introduced in Order 8 by the Amendment Act 104 of 1976, civil Courts, other than Chartered High Courts were following the practice of entertaining counter-claim subject to payment of court fees. According to the learned single Judge, in one sense, therefore, Rule 6-A must be held to have incorporated in the Code only that which had been an unwritten practice in court proceedings earlier. According to the learned Judge, a lot is to be said in favour of the contention put forward by the counsel in that case that a counter claim is a thing apart from the suit claim and its separate integrity should not be slurred over or minimised. The learned Judge went on to add that however, there are strong indications to the contrary to be found in the Code in the conception of the counter-claim especially as provided for Order 8, Rule 6-A, since the said Rule speaks of a counter claim as a plaint in one place and as a cross claim in another place. According to the learned Judge, nevertheless, in its most operative provision,

it lays down that the court shall pronounce a single judgment in the suit, both on the original claim and on the counter-claim and the susceptibility of a counter-claim to be dealt with in a single judgment along with a suit claim runs counter to the idea of the two being regarded as things apart. It was further observed by the learned Judge that it is not merely that the Code provides for a single judgment to dispose of, at one stroke, the suit claim as well as a counter-claim, like hitting two birds with one stone. The learned Judge observed that Rule 6-C specifically lays down a special procedure to separate the suit claim from the counter-claim, wherever the separation is called for and the said provision emphasises by implication that as a general rule, a suit claim and a counter-claim ought properly to be regarded as constituting a unified proceeding. In the view of the learned Judge, the rule, however, makes for an exception and should the plaintiff in a given case desire that the counter-claim filed by the defendant in answer to his suit claim be dealt with as a separate suit in itself, he ought to apply for that relief before the trial court and it should be done before the issues are settled and on his application for amending his suit claim and the counter-claim, the court will have to consider whether the counter-claim should be dealt with as part and parcel of the suit or whether the defendant should be referred to a separate suit and these exceptional provisions in Rule 6-C only illustrate the homogeneity of the suit claim and the counter-claim as a single proceeding. We are in full agreement with the views expressed by the learned single Judge.

10. The law, therefore, envisages that the plaintiff is at liberty to file an application before the learned single Judge to treat the counter-claim as a separate suit in terms of Order 8 Rule 6-C C.P.C. and that stage is yet to reach. The learned Senior Counsel appearing for the plaintiff/respondent, in fact, informs this Court that he intends moving an application before the learned single Judge to treat the counter-claim as a separate suit. In the event of the respondent/plaintiff applying before the learned single Judge that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit and seek an order to the effect that the counter-claim has to be excluded, the Court has jurisdiction to make an order as it thinks fit, after hearing the parties and the possibility of the learned single Judge treating the counter-claim as a separate suit is, therefore, not ruled out. In such an eventuality, there is no question of giving a set off while passing a decree for the admitted amount and the learned single Judge has not committed any error in passing the impugned order for the admitted amount of Rs.76 lakhs and odd as prayed for. In fact, in UTTAM SINGH DUGGAL & CO. LTD. vs. UNITED BANK OF INDIA [(2000) 7 SCC 120], the Supreme Court has held that where a claim is admitted, the Court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim and the object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled. The Supreme Court further went on to add that they need not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment and where the other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which it is impossible for the party making

such admission to succeed. It was further held that when a statement is made to a party and such statement is brought before the court showing admission of liability by an application filed under Order 12 Rule 6 and the other side has sufficient opportunity to explain the said admission and if such explanation is not accepted by the court, the trial court is helpless in refusing to pass a decree. In the above judgment, it was further held that admissions generally arise when a statement is made by a party in any of the modes provided under Sections 18 to 23 of the Evidence Act, 1872 and that admissions are of many kinds; they may be considered as being on the record as actual if they are either in the pleadings or in answer to interrogatories or implied from the pleadings by non-traversal and secondly, as between parties by agreement or notice.

11. As we stated earlier and at the risk of repetition, we cannot but state that the appellant/defendant admitted that Rs.76 lakhs and odd is due and payable by him by his letter dated 16.9.94 and also in the Memorandum of Compromise dated 29.11.95 as well as through letters dated 29.12.95 and 2.1.96 followed by issuance of two cheques for the said amount, which when presented have bounced. It is, therefore, clear that the appellant/ defendant has admitted his liability through the above documents and the learned single Judge was justified in passing a decree for the admitted amount in terms of Order 12 Rule 6 C.P.C. The appeal deserves to be dismissed and it is, accordingly, dismissed.

Index: Yes
Website: Yes

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To

The Sub Assistant Registrar,
Original Side, High Court,
Madras.